INDEX.

	Page
COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
A. Section 25 of the Interstate Commerce Act by Its Language Authorizes the Department of Transportation to Establish Flagging Requirements Where Found Necessary for the Safe Operation of Trains	4
B. Under Section 25 of the Interstate Commerce Act, the ICC and DOT Have Ordered the Railroads to Provide Flag Protection Where Deemed Necessary for the Safe Operation of Trains	6
C. Congress by Section 25 of the Interstate Commerce Act Intended to Grant to the Administering Federal Agency Exclusive and Plenary Power Over All Means of Spacing and Separating Trains to Avoid Train Collisions	8
D. The Decision Below Is in Accordance With the Principles Established by This Court	10
E. The PUC Orders in Fact Conflict With the Regulations and Requirements Established Under Section 25 of the Interstate Commerce Act	13
CONCLUSION	14
APPENDIX A—Appliances, Methods, and Systems Intended to Promote Safety of Railroad Operation, No. 29543, 268 I.C.C. 547, 560-561 (1947)	16

TABLE OF CITATIONS.

Cases: Page

Appliances, Methods, and Systems Intended to Promote Safety of Railroad Operation, 268 ICC 547 (1947) 6, 7

Baltimore & Ohio Ry. Co. v. Jackson, 353 U.S. 325 (1957) 8

Ex Parte No. 171, 278 ICC 267 (1950) 6

Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957) 14

In the Matter of Application for Approval of Proposed Modification of Systems or Devices Under Paragraph (b), Section 25 of The Interstate Commerce Act, as Amended, 251 ICC 453 (1942) 7

In the Matter of Application for Approval of Proposed Modification of Systems or Devices Under Paragraph (b), Section 25 of The Interstate Commerce Act, as Amended, 293 ICC 765 (1954) 7

In the Matter of Application for Approval of Proposed Modification of Systems or Devices Under Paragraph (b), Section 25 of The Interstate Commerce Act, as Amended, 298 ICC 503 (1956) 7

Napier v. Atlantic Coast Line RR Co., 272 U.S. 605 (1926) 10

Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) 12

Statutes:

Act of June 30, 1906, 34 Stat. 838, 45 U.S.C. 35 9

Act of March 4, 1907, 34 Stat. 1312 9

Act of May 27, 1908, 35 Stat. 325 9

Act of March 4, 1909, 35 Stat. 965, 45 U.S.C. 36137 9

Act of October 22, 1913, 38 Stat. 212 9

Act of February 28, 1920, 41 Stat. 456:

Section 1(21) 9

Section 441, 41 Stat. 497 10

Act of October 15, 1966, PL 89-670, 80 Stat. 937, 49 U.S.C. § 1655(e)(6)(A) 4

Interstate Commerce Act:

Section 25 (49 U.S.C. Sec. 26) 2, 3, 4, 5, 6, 8, 9, 10, 11, 13

TABLE OF CITATIONS (Continued).

Miscellaneous:

	Page
Federal Register of January 16, 1941, pages 452-453	7
4 Fed. Reg. 2146 (1939)	6
49 CFR, Part 136.1-136.838 (1958)	6
49 CFR § 136.23	13
49 CFR § 136.23(c)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

NOS. 443 AND 638.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioner,

v.

BESSEMER AND LAKE ERIE RAILROAD COMPANY, ET AL.,

Respondents.

COOPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS IN THE STATE OF PENNSYLVANIA,

Petitioner,

v.

BESSEMER AND LAKE ERIE RAILROAD COMPANY, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANA.

COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW.

1. Was not the Supreme Court of Pennsylvania correct in holding that Section 25 of the Interstate Commerce Act, dealing with regulation of "the block signal system, interlocking, automatic train stop, train control, and/or cab signal devices, and/or other similar appliances, methods, and systems intended to promote the safety of railroad operations", completely occupies the field of the spacing and separation of trains to prevent train collisions and preempts all state regulation in this field, including flag protection?

STATEMENT OF THE CASE.

Respondents accept the statement of the case set forth in the Petition of the Pennsylvania Public Utility Commission (hereinafter "PUC") in No. 443 for the purposes of this Brief.

Respondents except to the assertion in the Petition in No. 638 at page 5, that no argument was made by them that the PUC orders were a burden on interstate commerce. That argument was presented to the Superior Court of Pennsylvania. The Supreme Court of Pennsylvania allowed Respondents' appeal only on the question of preemption.

SUMMARY OF ARGUMENT.

The construction given Section 25 of the Interstate Commerce Act (49 U.S.C. Sec. 26) by the Supreme Court of Pennsylvania is compelled by the language of that section, its interpretation and application by the federal agencies charged with its administration, and by the intent of Congress, as evidenced historically, to regulate fully in the area of protecting against train collisions. This is an area where the purposes of the federal statute require uniformity. Furthermore, the orders of the PUC set aside by the Supreme Court of Pennsylvania are in conflict with the federal statute and obstruct the purposes thereof.

The decision below is in accordance with the principles established by this Court governing the preemption of state action by Congressional enactments.

ARGUMENT.

A. Section 25 of the Interstate Commerce Act by Its Language Authorizes the Department of Transportation to Establish Flagging Requirements Where Found Necessary for the Safe Operation of Trains.

Contrary to the assertions of Petitioners, the Department of Transportation[1] (hereinafter "DOT") does have power to require flag protection of trains to prevent collisions, either as a specification or requirement prescribed by the DOT in connection with the block signal system or other method or system, or as a separate system to provide a safety zone ahead of or in the rear of trains to prevent collisions. The DOT, in fact, has now adopted and continued in effect Interstate Commerce Commission (hereinafter "ICC") requirements for flag protection in connection with block signal systems, and in the light of the historical development of railroad signalling, and the purposes thereof, its prescription of flagging as a separate system of protecting trains against collisions, not in conjunction with any other system, is clearly authorized by the statute.

Even in the days when only one train moved on a railroad line, flagging was used to prevent collisions at crossings and to clear the track, and an employee preceded the train to provide a safety zone ahead of it. As soon as two trains moved on the same track, such a safety zone was needed ahead of or behind a train to guard against train collisions. So-called flagmen used signals such as colored flags, lamps and fuzees. Then other systems were devised to provide the safety zones needed to space and separate trains to avoid collisions. These included train orders, which

1. The powers conferred on the Interstate Commerce Commission by Section 25 of the Interstate Commerce Act were transferred to DOT effective April 1, 1967. Act of October 15, 1966, PL 89-670, 80 Stat. 937, 49 U.S.C. § 1655(e)(6)(A).

confined train movement to clear track or set up meeting points for trains; schedules whereby following trains were required to keep a specified number of minutes apart; allocation of trains into designated classes, with trains of inferior classes required to clear into sidings prior to the arrival of superior trains; and the use of timed fuzees to separate trains, the following train being required to stop until the fuzee burned out, thus maintaining the required time interval between trains. Flagging and all of these other devices, separately or in combination, were (and still are) used by railroads for the purpose of preventing train collisions.

The block system, now widely used, was introduced some 100 years ago. Under this system track is divided into lengths of defined limits, or "blocks", and a train is not permitted to enter a block without permission. This permission is obtained orally or in writing, from the aspect of a fixed signal operated either manually or by electric circuits, or by a manual signal such as a wave of the hand or of a colored flag. Depending on the particular form of block system in use, there may or may not be employees stationed at the entrance to blocks. The lengths of blocks vary from a normal one to two miles in automatic block system territory to possibly as many as thirty miles in manual block system territory. The block system, with its later refinements through automatic signalling, cab signals, and the use of train control and train stop equipment, became accepted as the principal and best system for the creation of the necessary safety zones ahead of or behind trains to prevent collisions.[2]

Section 25 of the Interstate Commerce Act (49 U.S.C. Sec. 26) specifically delegates to the DOT the power to require installation of block signal systems and other

2. It is obvious that present day heavy volumes of rail traffic, let alone operation of trains at high speeds ranging up to 150 m.p.h., would not be possible if the railroads still relied on flagging to create the safety zones needed to prevent train collisions.

similar appliances, methods, and systems intended to promote the safety of railroad operation, authorizes the DOT to issue all specifications and requirements necessary to effectuate such systems, and requires that no discontinuance or material modification of such systems be made without DOT approval. As has been clearly indicated, the use of flagging to create safety zones ahead of and behind trains is simply one of the systems adopted by the railroads either singly or in combination with other systems, to establish such safety zones to prevent train collisions. It is submitted, therefore, that the Supreme Court of Pennsylvania was entirely correct in its holding that Congress has delegated to the DOT full power over the use of flag protection by the railroads to provide safety of operation.

B. Under Section 25 of the Interstate Commerce Act, the ICC and DOT Have Ordered the Railroads to Provide Flag Protection Where Deemed Necessary for the Safe Operation of Trains.

The construction of Section 25 of the Interstate Commerce Act set forth above is reinforced by the manner in which that Section has been applied by the ICC and DOT. These agencies have consistently given a broad construction to their grant of power over systems used by the railroads to prevent train collisions. They have gone far beyond the control of mechanical devices used by the railroads for these purposes.

Regulations and requirements with regard to automatic block systems were first published in 4 Fed. Reg. 2146 (1939) and amended by orders issued in *Appliances, Methods and Systems Intended to Promote Safety of Railroad Operation,* 268 ICC 547 (1947) and in *Ex Parte No. 171,* 278 ICC 267 (1950).[3] These regulations and require-

3. As amended to date this order is set forth in 49 CFR, Part 136.1-136.838 (1958).

ments go far beyond mechanical specifications for installation and maintenance of the signals used; they go into almost every detail of train operation under automatic signal systems.

The ICC also has issued requirements with respect to the operation of trains under manual block signal systems, *including the requirement that flag protection be used under specified conditions.* Although proposed detailed rules for manual block systems published in the *Federal Register* of January 16, 1941, pages 452-453, were never adopted, flag protection requirements have been attached to orders issued in specific cases approving manual block system operation (*e.g., In the Matter of Application for Approval of Proposed Modification of Systems or Devices Under Paragraph (b), Section 25 of The Interstate Commerce Act, as Amended,* 251 ICC 453 (1942); *In the Matter of Application for Approval of Proposed Modification of Systems or Devices Under Paragraph (b), Section 25 of The Interstate Commerce Act, as Amended,* 293 ICC 765, 768 (1954); *In the Matter of Application for Approval of Proposed Modification of Systems or Devices Under Paragraph (b), Section 25 of The Interstate Commerce Act, as Amended,* 298 ICC 503, 506 (1956)).

Even more significant is an order issued by the ICC in *Appliances, Methods, and Systems Intended to Promote Safety of Railroad Operation,* 268 ICC 547 (1947), applicable to all railroads in the United States, establishing requirements for manual block system operation including the establishment of a safety zone by flag protection whenever passenger trains are admitted to a block occupied by another train.[4]

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4. A copy of the Commission's findings (268 ICC at pp. 560-561) is printed in Appendix A to this Brief, *infra,* p. 16. Copies of letters from ICC and DOT confirming the continued effectiveness of this order, are attached to the Petition in No. 638 as Appendices II and III (pp. 33 and 35). Although Petitioners attempt to dismiss the flag protection requirement as a "permissive requirement"

The ICC and DOT have therefore exercised the powers granted them by Congress to stipulate flag protection as a requirement in connection with the operation of block signal systems where those agencies found such supplemental protection necessary for the safe operation of trains.

Although neither the ICC nor DOT has issued specific requirements for flag protection in the absence of block signal systems,[5] it is submitted that the Pennsylvania Supreme Court correctly held that the federal agencies were granted the power to take such action as a part of the regulation of systems used by railroads to create safety zones ahead of and behind trains to prevent train collisions.

C. Congress by Section 25 of the Interstate Commerce Act Intended to Grant to the Administering Federal Agency Exclusive and Plenary Power Over All Means of Spacing and Separating Trains to Avoid Train Collisions.

The intent of Congress to give the ICC and DOT full and exclusive power to regulate this field of systems used by the railroads to prevent train collisions is shown not

(Petition in No. 638, at p. 18), it is still a fact that when a passenger train is admitted to a manual block occupied by another train, a safety zone created by flag protection must be provided. Petitioners would no doubt argue that since an individual need not drive an automobile, laws requiring operators' licenses simply contain "permissive requirements". It should be noted that ICC Order No. 29543 also requires the use of train orders or prescribed forms, and establishes speed restrictions, all for the purpose of preventing train collisions. Certainly the powers of the DOT under Section 25 of the Interstate Commerce Act are not limited to the installation, inspection and maintenance of mechanical devices, as Petitioners assert, but in fact cover all means necessary to protect against train collisions.

5. Past administrative inaction is not conclusive as to Congressional intent. See, *e.g., Baltimore & Ohio Ry. Co. v. Jackson*, 353 U.S. 325 (1957).

only by the broad language of Section 25 of the Interstate Commerce Act but also by the history of federal interest in the safety of train operation.

Congressional concern with the safety of train movements has been consistently demonstrated over a long period of time. Congress began to enact railroad safety statutes soon after the establishment of the Interstate Commerce Commission in 1887, passing laws requiring safety appliances and limiting hours of service. Congress also recognized the importance of developing and placing on the railroads adequate systems of spacing and separating trains to avoid collisions, and recognized that this was a matter of national concern. By its Act of June 30, 1906, 34 Stat. 838, 45 U.S.C. 35, Congress directed the ICC to investigate the use and necessity for block signal systems and appliances for the automatic control of trains. The Commission's report was submitted to Congress in February of 1907 and the continued interest of Congress in this safety area was evidenced by the Acts of March 4, 1907, 34 Stat. 1312; May 27, 1908, 35 Stat. 325; March 4, 1909, 35 Stat. 965, 45 U.S.C. 36-37; and October 22, 1913, 38 Stat. 212.

In conjunction therewith, the ICC repeatedly emphasized the need for regulation of railroad operations, from the safety standpoint, by the Federal Government. For example, in its 29th Annual Report (1915) the ICC stated that safety of railway travel depended upon uniformity in the codification and application of rules relating to the operation of trains and that such uniformity could only be obtained through federal legislation (page 56).

Ultimately, Congress responded to this clear federal interest by passage of the Transportation Act of 1920 (Act of February 28, 1920, 41 Stat. 456). Section 1(21) of this Act empowered the ICC to require railroads to provide safe and adequate facilities for performing its car service as a common carrier. Additionally Congress established

the forerunner of the present Section 25 of the Interstate Commerce Act by giving the ICC authority to require installation of automatic train stop or train control devices, or other safety devices (Section 441, 41 Stat. 497).

The present statute greatly expanded this authority, giving the ICC and DOT power not only over devices designed to stop trains but also over the block signal systems and all other systems of spacing and separating trains to prevent train collisions.

It is submitted that the persistent Congressional interest in the area of safe operation of trains without collisions and the expanded powers given to the federal agencies by the present Section 25 of the Interstate Commerce Act were correctly recognized and given proper weight in the decision of the Supreme Court of Pennsylvania when it found that Congress intended to and did grant to the federal agencies involved exclusive powers to regulate the systems used by railroads to prevent train collisions.

D. The Decision Below Is in Accordance With the Principles Established by This Court.

The Supreme Court of Pennsylvania in its opinion has applied to the facts and circumstances of this case, principles of constitutional construction fully in accordance with those enunciated by this Court. It has applied established principles which govern the question of preemption where the language of a federal statute is clear, the grant of power to the federal agency is general and complete, and the intent of Congress to give exclusive jurisdiction to the federal regulatory body is evident from the subject matter, the federal interest therein, and the need for uniformity which negatives the possibility of effective state regulation.

In support of its holding, the Court below cited *Napier v. Atlantic Coast Line RR Co.*, 272 U.S. 605 (1926). The

constitutional basis for that decision is as firm today as when the decision was handed down. When Congress has shown its intention to occupy fully a field of regulation of interstate commerce, supplemental state regulation is invalid, even where it does not conflict with existing federal regulations or where its purpose is different from that of the federal statute.[6]

Given the intent of Congress to fully regulate the field of protection of trains against collisions through delegation of powers to the DOT, there is no conflict with the decisions of this Court which Petitioners have cited. This is not a case where there is a "gap" in the powers granted which leaves room for state regulation, nor is it a case where the subject matter is such that concurrent state regulation can be tolerated.

Petitioners argue for an unwarranted and limited construction of Section 25 of the Interstate Commerce Act, in an obvious effort to limit the powers granted by the Congress to DOT to "mechanical devices" fixed at specific railroad locations which do not cross state borders. Such a limited construction of Section 25 is contrary to its language and to its application by the DOT. Railroad operating rules necessarily affect employees and trains moving between states, and the perils involved in conflicting state regulations and the need for federal regulation, if any regulation is required, are obvious.

This is not a matter involving a dominant, persistent state interest, nor one involving peculiar local safety conditions which vary from state to state. Since train crew members may pass through as many as three or four states in a day in the operation of a single train, the necessity that the

6. In the instant case, as will be shown *infra*, the PUC orders were directed to the same purpose as the federal statute, and also conflicted with the requirements established by the federal agencies, thus obstructing the Congressional purpose.

employing railroad have a single uniform code of basic operating rules applicable in all states is self-evident, from the standpoint of safety and efficiency.[7] This is recognized by DOT in its specifications for block systems; the need for uniformity in the systems used by a railroad to space and separate trains is shown by the DOT requirement that all signal aspects on a given railroad, wherever it may operate, must have a uniform meaning. 49 CFR § 136.23(c).

Although operating rules necessarily allow for variance based on physical and other operating characteristics directly related to the movements of the trains, variances based solely on the location of state borders are totally illogical and create only additional hazards to safety of operation. It is evident that this is a field which Congress recognized as one of "those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority". *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 767 (1945).

The orders of the PUC which were stricken by the Supreme Court of Pennsylvania go to the heart of the matter which Congress has properly entrusted to DOT—the field of protection of trains against collision with other trains. The PUC would require all railroads to maintain in Pennsylvania, for all trains, the earliest system of protection against collisions devised in the history of railroad operation, whether or not the railroads, at the same time,

7. Already a number of states have adopted different flagging requirements, as shown at pages 41 to 43 of the Petition in No. 443, New Jersey simply restored the *status quo* prior to the railroads' 1964 rule changes. Pennsylvania required flagging on all tracks, including many where it had never been required or had been long abandoned, and Maryland required it only under unusual circumstances (requirements consistent with existing railroad practices). Delaware accepted the railroads' elimination of flag protection.

employ the newer systems of protection mandated or approved by the DOT. The PUC has thus invaded an area of dominant federal interest, where the Congress has entrusted full power to the DOT. Rejection of this action by the Court below followed inevitably from the application of the principles firmly established by this Court.

E. The PUC Orders in Fact Conflict With the Regulations and Requirements Established Under Section 25 of the Interstate Commerce Act.

Contrary to Petitioners' assertions, the PUC orders with regard to flag protection do conflict with outstanding orders of the DOT and for that reason alone must fall.

For example, DOT Order No. 29543 (See Appendix A to this brief, p. 16, *infra*) provides that where a train other than a passenger train is permitted to enter an occupied manual block, the protection of "train order, permissive signal, or prescribed form" must be employed, together with a speed limitation to ensure that the train can stop short of a train or obstruction. Flag protection is not here required, as it is in the same paragraph of the order where a passenger train is to be permitted to enter an occupied manual block. This can be regarded only as an application of the expertise of the federal agency under the powers delegated by Congress in the field of protection of trains against collisions, resulting in the conclusion that where other than passenger trains are involved, means of protection other than flagging are either better or are sufficient to effectuate the purposes of the statute.

The PUC orders of November 22, 1965 (Petition in No. 443, pp. 9-10) and December 19, 1966 (Petition in No. 443, pp. 11-15) both require flagging in this situation, contrary to the federal determination.

Another example is evidenced by consideration of the rule promulgated at 49 CFR § 136.23, discussed *supra* at

p. 12, requiring uniformity in the meaning of signal aspects throughout the lines of a railroad. Most railroads, in automatic block signal system territory, use a "stop-and-proceed" aspect at the entrance to an occupied block. The engineer must first stop his train, but may then proceed at limited speed, prepared to stop within his range of vision. The safety zone behind the train in advance starts at the stop-and-proceed signal. Where Pennsylvania, or any other state, imposes a flagging requirement in this situation, the meaning of the signal aspect is affected, because the engineer is led to expect that by virtue of the state regulation there is an additional and secondary safety zone, marked by a man with a flag or fuzee, to be reached before he encounters a train or obstruction. Thus the signal aspect gives a different meaning to the engineer in a state requiring flagging than in the state where no such requirement exists.

It is submitted, therefore, that the attempted regulation of the spacing and separation of trains by the PUC does in fact conflict with and obstruct the effectiveness of existing federal regulation in the same field, and for that reason alone the holding of the Supreme Court of Pennsylvania is correct. Petitioners themselves do not contend that where such conflict exists state action can be sustained.

CONCLUSION.

The decision below creates no "vacuum" in an area of railroad safety, because the federal agencies have the power, in controlling the systems of separating and spacing trains to avoid collisions, to specify and require the use of flagging, as well as train orders and other devices, where necessary for safety of operation.[8] The decision is limited

8. This Court has held that in instances where, as here, Congress has meant to reach to the full extent of its power under the Commerce Clause, thus invalidating state action, even the existence of a no-man's land has no significance. *Guss v. Utah Labor Relations Board,* 353 U.S. 1 (1957).

to one particular aspect of state entrance into the federal area, and does not extend to all state statutes or regulations intended to protect the employees and property of the railroads or the public.

Congress has given the DOT full power to control and specify the systems used by the railroads to space and separate trains to avoid collisions and thus provide safe train operation. These systems include flagging, and the power to require flagging has been exercised under the Congressional grant. The need to approach and regulate this field of prevention of train collisions on a national basis, rather than state-by-state, has long been recognized and the field involves no peculiar local concern of the states. The action here attempted by Pennsylvania conflicts with existing federal regulation and policies and obstructs effectuation of the Congressional purpose.

Respondents respectfully request that the Petitions for Certiorari in Nos. 443 and 638 be denied.

Respectfully submitted,

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APPENDIX A.

Appliances, Methods, and Systems Intended to Promote Safety of Railroad Operation, No. 29543, 268 I.C.C. 547, 560-561 (1947):

FINDINGS.

We find that in order to promote safety of railroad operation it is necessary in the public interest to require each respondent to—

1. Install on that part or parts of its lines over which any passenger train is operated at a speed of 60 or more miles per hour, or any freight train is operated at a speed of 50 or more miles per hour, an automatic block-signal system which shall conform to the rules, standards, and instructions prescribed by the order of the Commission of April 13, 1939, as herein amended, or a manual block system which shall conform to the following conditions:

A passenger train will not be permitted to the block when occupied by another train, expect under flag protection; no train will be admitted to the block when occupied by an opposing train or by a passenger train, except under flag protection; and a train other than a possenger train will not be permitted to follow a train other than a passenger train into the block except when authorized by a train order, permissive signal, or prescribed form, and when such movement is so authorized, the following train must proceed prepared to stop short of a train or obstruction, but not to exceed 15 miles per hour.

2. Install on that part or parts of its lines over which any passenger or freight train is operated at a speed of 80 or more miles per hour an automatic train-stop or train-control system or automatic continuously controlled cab-signal system which shall conform to the rules, standards, and instructions prescribed by the order of the Commission of April 13, 1939, as herein amended.

We further find that the definition of "medium speed" in the rules, standards, and instructions prescribed by the order of the Commission of April 13, 1939, should be amended to read as follows:

Medium speed.—A speed not exceeding one-half authorized speed, but not exceeding 30 miles per hour.

We further find that the rules, standards and instructions prescribed by the order of the Commission of April 13, 1939, should be amended to include the following definition:

Low (restricted) speed.—A speed that will permit stopping short of another train or an obstruction, but not exceeding 15 miles per hour.

An appropriate order will be entered.